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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

9    UNITED STATES OF AMERICA,                         Case No. 2:12-cr-0004-APG-GWF

10                 Plaintiff,

11    v.                                               **Order Denying [#498] Non-Party
      Google, Inc.'s Motion to Quash Trial**
12    DAVID CAMEZ, et al.,                             **Subpoena**

13                 Defendants.

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16         In 2011, Google, Inc., produced Gmail communications and other electronically stored

17    records pursuant to a search warrant.  Doc. 498-1 at 2.  When the Government subpoenaed Google's

18    custodian of records ("COR") to testify at trial, Google responded with a single-page, five-paragraph

19    "Certificate of Authenticity" from the COR and a motion to quash the subpoena under Federal Rule

20    of Criminal Procedure 17(c)(2).  Docs. 498 and 498-1 at 9.  This Court is presented with the narrow

21    question of whether it is unreasonable or oppressive for the Government to require Google's COR to

22    authenticate these records with live testimony at trial when a certificate of authentication was

23    provided under FRE 902(11).  The unique circumstances in this case compel this Court to answer

24    that question in the negative and deny Google's motion to quash.  Doc. 498.

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26    **A.      As the Proponent of the Google Records, the Government May Choose to Authenticate
              Them Through Live Testimony Instead of a Certificate of Authenticity.**

27         "Computer records are properly admissible as business records under [Federal Rule of

28    Evidence] 803(6)."  *U.S. v. Bonallo*, 858 F.2d 1427, 1435 (9th Cir. 1988).  The Rule excepts

1  business records from hearsay exclusion if certain foundational requirements are "shown by the

2  testimony of the custodian or another qualified witness, or by a certification that complies with Rule

3  902(11) or (12) . . . ." Fed. R. Evid. 803(6)(D).[1]  The express language of the Rule gives the

4  proponent of business records two options for authenticating business-record evidence at trial: the

5  custodian of records or another qualified witness may offer (1) live testimony or (2) a certificate of

6  authenticity.[2]

7         As the proponent of the Google evidence, the Government has the choice of which method to

8  use to authenticate these records at trial.  With a "bare-bones" certificate of authentication and a

9  defendant who has placed "hacker" and other online data-infiltration allegations at issue by his

10  defense theories, the Government chooses live trial testimony.  Google does not contest that the

11  subpoena was properly issued and served; it contends rather that the Government's choice of trial

12  testimony over the certificate puts an unreasonable and oppressive burden on Google to comply with

13  the subpoena.  The Court disagrees.

14  **B.     Compliance with the Subpoena Will Not Be Unreasonable or Oppressive for Google.**

15         A trial court may quash a subpoena when the party resisting compliance demonstrates that

16  "compliance would be unreasonable or oppressive." Fed. R. Crim. Proc. 17(c)(2).  The rule:

17              requires a discretionary, case-by-case inquiry. There is no rule of law that
                without some particular factor, the government cannot have the subpoena,
18              or that with it, it can.  The factors the district court must consider under
                Rule 17(c)(2)—unreasonableness and oppressiveness—cannot sensibly
19              be converted into a mechanical rule enabling an escape from case-by-case
                judgment.
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22       [1] Prior to 2000, authentication required testimony.  Rule 803(6) was amended in 2000 "to add
    that, in lieu of live testimony, the foundation for admissibility of a business record may be established
23  by a certification that complies with Rule 902(11). . . ." *U.S. v. Kahre*, 610 F. Supp. 2d 1261 (D. Nev.
    2009); *see also* Fed. R. Evid. 803(6), advisory committee notes (2000).

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         [2] Fed. R. Evid. 902(11); *United States v. Lauersen*, 348 F.3d 329, 342 (2d Cir. 2003) (quoting
25  5 WEINSTEIN'S FEDERAL EVIDENCE, § 803.08[8][b] for the proposition that "[i]nstead of providing live
    testimony from a custodian or other qualified witness, the proponent of business records may choose to
26  present the foundation by a certification that complies with Rule 902(11)," and holding that business
    record was properly admitted where other qualified witness' testimony obviated need to authenticate by
27  Rule 902(11) certificate); *see also Tongil Co. v. Vessel Hyundai Innovator*, 968 F.2d 999, 999–1000
    (9th Cir. 1992) (citing *United States v. Catabran*, 836 F.2d 456, 456 (9th Cir. 1988), which notes that
28  the burden is on "the proponent of the business records" to "satisfy the foundational requirements of the
    business records exception").

1  *United States v. Bergeson*, 425 F.3d 1221, 1225 (9th Cir. 2005).

2       Google contends that compliance would be unreasonable and oppressive because the

3  Defendant is demanding testimony from Google's COR "on issues that are either beyond Google's

4  knowledge or based on irrelevant speculation." Doc. 511 at 4.  But the Government, not the

5  Defendant, issued the subpoena, and the Government has represented its intention to seek testimony

6  from this witness specifically related to the data-storage and retention issues that are likely within the

7  COR's knowledge but beyond the "bare-bones" assertions in the certificate of authenticity.  *See* Doc.

8  512 at 3.[3]  Defense counsel also noted that he is attempting to procure the appearance of a Google

9  Person Most Knowledgeable to address issues that may exceed the COR's likely testimonial

10 limitations.  And, of course, relevancy and personal-knowledge objections can be addressed as they

11 come up at trial.  Thus, the potential scope of questioning will not likely result in an unreasonable or

12 oppressive experience that justifies quashing the subpoena.[4]

13       Nor does the potential that testimony will duplicate the information contained in the

14 certificate of authenticity render compliance unreasonable or oppressive or defeat the purpose for

15 which FRE 902(11) was adopted.  Doc. 498 at 5; Doc. 511 at 4.  Although the certificate method of

16 authenticating business records is a valuable shortcut, the proponent of business records maintains

17 the discretion to authenticate them through live trial testimony.  *See supra* note 1.  Nothing in the

18 amended Rule suggests that a COR can opt out of testifying at trial and effectively evade a subpoena

19 merely by providing a Rule 902(11)-compliant certificate of authenticity.  Because the

20 representations in the instant certificate are thin and, as the Government asserts, the unique facts and

21 circumstances of this case justify a deeper inquiry into Google's data-storage and retention policies

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25       [3] This distinguishes this case from *United States v. Doolittle*, 341 F. Supp.163, 169 (M.D. Ga.

26 1972), cited by Google for the proposition that a witness subpoena should be quashed when live
   testimony would be entirely duplicative of the assertions in the authenticating affidavit.  Doc. 498 at 5

27 n.2.

28       [4] This decision leaves the resolution of any evidentiary objections to this potential testimony for
   the trial court.

1  and practices,[5] any potential duplication will be minimal and not a basis to quash.

2       Finally, the Court is not persuaded by Google's forecast that failing to quash this subpoena

3  will do away with the certificate process altogether and cause Google to "send witnesses to each

4  criminal trial in which its business records are offered as evidence." Doc. 511. This case involves

5  sophisticated online computer activity. As Government counsel represented at the hearing on this

6  motion, the defense theory raises "a parade of horribles" regarding the integrity of the computer data.

7  The records at issue are "essential" to prove one of the racketeering acts alleged in this case. Doc.

8  512 at 2. And, most importantly, the proponent of the business-records evidence (the Government)

9  elects to authenticate that evidence with live testimony instead of a Rule 902(11) certificate, a choice

10 it does not make lightly or often. It is this unique set of circumstances that compels the denial of

11 Google's motion to quash and limits this ruling to the facts of this case.

12                                   **Order**

13       Accordingly, and for all the reasons set forth above, IT IS HEREBY ORDERED that Non-

14 Party Google, Inc.'s Motion to Quash Subpoena to Testify at a Hearing or Trial in a Criminal Case

15 **[#498] is DENIED**;

16       It is FURTHER ORDERED that Defendant Camez's motions to join in the Government's

17 response and Defendant Kostyukov's response **[#505, #515] are GRANTED**.

18       DATED: November 21, 2013.

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   JENNIFER A. DORSEY
   UNITED STATES DISTRICT JUDGE

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27       [5] This is not to suggest that live authentication testimony is required whenever a defendant

28 "speculates" or makes a bald allegation that business records were altered or are otherwise untrustworthy. Doc. 511 at 4. Those are not the facts before this Court.